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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1487

MICHAEL DeMICHELE and MARY P. DeMICHELE

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Michael and Mary P. DeMichele, husband and wife, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on January 10, 1974.

Opinions Below

The findings of fact and opinion of the Tax Court (Appendix A, *infra*, pp. 7-10) are reported at T.C. Memo 1973-115. The Court of Appeals was unable to write an opinion in this case; the judgment of the Court of Appeals is printed at Appendix B (*infra*, p. 11).

Jurisdiction

The judgment of the Court of Appeals was entered on January 10, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the imposition of an income tax on $575.47 of petitioner Michael DeMichele's $1,984.38 ordinary and necessary trade or business expenses violates petitioner's rights under the 16th Amendment to the Constitution of the United States to be taxed only on petitioner's income.

2. Whether the Congress or Commissioner has any power under the 16th Amendment to the Constitution of the United States to impose a tax on more than petitioner's income.

3. Whether the Commissioner can, under the Constitution, abrogate petitioner's rights under the 16th Amendment to the Constitution of the United States to be taxed only on petitioner's income and impose an income tax on petitioner's ordinary and necessary trade or business expenses simply by asserting that "the description of the job site indicates that storage of tools was feasible".

4. Whether merely $1,408.91 of petitioner's $1,984.38 expenses of driving to and from work by automobile are excludable and protected from a tax on income by the 16th Amendment to the Constitution of the United States or whether the entire $1,984.38 driving expenses are so excludable and protected.

Statutes and Constitutional Provisions Involved

CONSTITUTION OF THE UNITED STATES

> 16th AMENDMENT. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Statement of the Case

During the year 1967, Michael DeMichele ("Michael") was in the trade or business of being an employee. In the process of receiving $10,506.37 wages in his trade or business, Michael paid or incurred $1,984.38 ordinary and necessary trade or business expenses of driving to and from work by automobile, deriving $8,521.99 gross income from his trade or business.

In addition to laying an income tax on Michael's derived $8,521.99 gross income, the Commissioner is attempting to lay an income tax on $575.47 of Michael's $1,984.38 trade or business expenses. The Commissioner's sole excuse for laying an income tax on $575.47 of Michael's trade or business expenses is "because the description of the job site indicates that storage of tools was feasible."

Reasons for Granting the Writ

1. A tax on $575.47 of Michael's $1,984.38 trade or business expenses is unconstitutional as violative of the 16th Amendment to the Constitution which grants Congress power to lay a tax on *incomes* — as distinguished from *expenses*.

2. The decision below conflicts with the Second Circuit decision in *Davis v. U.S.*, 87 F. 2d 323, 324, 325 (CAA 2d, 1937), *cert. denied* 301 U.S. 704, 81 L.Ed. 1359, 57 S.Ct. 937 (1937), where Circuit Judges Chase, Learned Hand, and Manton ruled as a matter of Constitutional Law that trade or business expenses may not be taxed as income by Congress or the Commissioner directly or indirectly.

3. The decision below conflicts with the Ninth Circuit decision in *Crowther v. Commissioner*, 269 F. 2d 292 (C.A. 9) where none of Crowther's automobile expenses of going to work were subjected to a tax on income.

4. The decision below conflicts with the Second Circuit's *first* holding in *Sullivan v. Commissioner*, 368 F. 2d 1007, that none of Sullivan's driving expenses could be subjected to a tax on income if Sullivan would not have driven his automobile to work but for the necessity of bringing his tools with him.

The *second* holding in *Sullivan* to the effect that two-thirds of Sullivan's driving expenses could be subjected to a tax on income if Sullivan "would have driven to and from work had it not been necessary to transport his tools" was based on an undefined "allocation" rule. The *second* holding in *Sullivan* has always been under attack by every knowledgeable tax and constitutional lawyer in the nation. The *second* holding of *Sullivan* has recently been rejected by this Court in *Fausner v. Commissioner*, 413 U.S. 838, decided June 25, 1973, *rehearing denied*, October 9, 1973.

In its *Fausner* opinion this Court did not address itself to the *first* holding in *Sullivan*, *supra*, that none of Sullivan's driving expenses could be subjected to a tax on income in a "*first*-holding" factual situation. Neither did this Court address itself, in its *Fausner* opinion, to any question of Constitutional law.

Upon oral argument before the Second Circuit in the instant case, Chief Judge Kaufman and Judges Smith and Feinberg could not figure out any Constitutional basis for the Supreme Court's decision that Fausner's expenses could be subjected to a tax on income. It seemed to all of us at oral argument that the Supreme Court "happenstance" ruling in *Fausner* was an error which probably came about because the Supreme Court did not permit the filing of briefs by either side in the *Fausner* case and did not permit oral argument by either side in the *Fausner* case.

5. The decision below conflicts with the Seventh Circuit's *first* holding in *Tyne v. Commissioner*, 385 F. 2d 40, *after remand*, 409 F. 2d 485, *cert. denied*, 396 U.S. 833, *on remand*, 29 T.C.M. 1398, *affirmed*, 468 F. 2d 913, where

that Court ruled that none of Tyne's driving expenses could be subjected to a tax on income if Tyne would not have driven his vehicle to work but for the necessity of bringing his tools with him.

The *second* holding in *Tyne* to the effect that 50% of Tyne's driving expenses could be subjected to a tax on income if Tyne "would have driven to and from work had it not been necessary to transport his tools" has always been under attack by every knowledgeable tax and constitutional lawyer in the nation. This *second* holding of *Tyne* has recently been rejected by this Court in *Fausner v. Commissioner, supra.*

In its *Fausner* opinion this Court did not address itself to the *first* holding in *Tyne, supra*, that none of Tyne's driving expenses could be subjected to a tax on income in a "*first*-holding" factual situation. Neither did this Court address itself, in its *Fausner* opinion, to any question of Constitutional law.

6. Upon oral argument of the instant case before the Second Circuit Court of Appeals, the Second Circuit judges made known their desire to have the Supreme Court issue guidance on the constitutional questions presented. They could not write an opinion in this case without guidance from the Supreme Court.

7. There are more than 50 million persons who travel to and from work in this nation. No reasoned direction is being provided this massive number of people on the question of how much of their trade or business expenses may be taxed as income.

8. Since the adoption of the 16th Amendment to the Constitution in 1913 and the enactment of the Income Tax Act of 1913, no definitive ruling has been made by the Supreme Court on the Constitutional questions here presented. Such a ruling is desirable in the administration of the Federal Tax Laws.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for oral argument.

Respectfully submitted,

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Attorney for Petitioners

April, 1974

Appendix A

T.C. Memo 1973-115

UNITED STATES TAX COURT

MICHAEL DeMICHELE and MARY P. DeMICHELE, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 2795-71. Filed May 22, 1973.

Thomas J. Carley, for the petitioners.

Fred L. Baker, for the respondent.

MEMORANDUM OPINION

SCOTT, *Judge*: Respondent determined a deficiency in petitioners' income tax for the calendar year 1967 in the amount of $83.79.

The issue for decision is the deductibility by petitioners of the portion of the deduction they claimed for automobile expense which was disallowed by respondent.

All of the facts have been stipulated and are found accordingly.

Petitioners, Michael and Mary P. DeMichele, are husband and wife who resided in Amityville, New York at the time of the filing of their petition in this case. They filed a joint Federal income tax return for the calendar year 1967 with the district director of internal revenue, Brooklyn, New York.

Michael DeMichele (hereinafter referred to as petitioner) was employed during the taxable year 1967 as a carpenter by Valdini Drywall Corporation of North Massapequa, New York and Approved Partition Co., Inc., of Massapequa, New York.

On his Federal income tax return for the calendar year 1967 petitioner deducted as "total deductible automobile expenses" the amount of $1,984.38. In computing this amount of deduction, petitioner stated the total months the automobile was used in business to be 12 months, that the total mileage of the 12 months was 17,793 miles, and that the portion of this mileage "applicable to business" was 17,793 miles. Petitioner included in the automobile expenses computed on his return an amount of $942.33 as depreciation which he showed to be depreciation on a "Ford truck" depreciated on a straight line basis with a useful life stated to be 3 years.

Respondent in his notice of deficiency disallowed $575.47 of the amount claimed by petitioner to be deductible automobile expense, with the following explanation:

> Employee Business Expense - The following automobile mileage has been disallowed (except for 1 full day representing a round-trip to transport tools to and from job site) because the description of the job site indicates that storage of tools was feasible:

Job Site Location	*No. Days Disallowed*	x	*Mileage*	=	*Disallowance*
Garden Apt: Port Jefferson	28	x	120	=	3,360
Garden Apt: Bay Shore	5	x	36	=	180
Bank-Hauppauge	7	x	63	=	441
Garden Apt: Port Jefferson	1	x	120	=	120
Mormon Church Plainview	11	x	32	=	352
Administration Bldg. Plainedge	10	x	16	=	160
Bank - Brooklyn	3	x	115	=	345
Funeral Home - Hicksville	7	x	35	=	245
	Total Miles Disallowed				5,203

Total Miles Disallowed 5,203
Total Business Miles Logged 17,793=29% Disallowed

Employee Business Expenses Claimed $1,984.38
29% Disallowed $575.47 (adjustment)

Petitioner's sole contention is that respondent, by using the words, "Total Business Miles Logged 17,793" in his explanation of his disallowance of automobile expenses in his notice of deficiency has conceded that the total mileage driven by petitioner in 1967 was "business miles logged." Petitioner states that this concession on the part of respondent in his notice of deficiency is tantamount to a concession that petitioner is entitled to deduct the total of the $1,984.38 which he claimed as employee business expenses since employee business expenses are properly deductible under section 162, I.R.C. 1954.[1]

In our view a reasonable interpretation of the explanation given by respondent in his notice of deficiency for the disallowance of $575.47 of the amount claimed by petitioner as automobile expenses is that of the total mileage of 17,793 miles driven by petitioner, 5,203 miles were not driven for business purposes. The use of the words, "Total Business Miles Logged," when considered in conjunction with the explanation of the claimed business expense deduction on petitioner's return showing 17,793 miles as "applicable to business," is merely an explanation of how respondent computed the percentage of the total miles driven which he considered to be non-business mileage. We do not view the statement in the context used in the deficiency notice to be a concession by respondent that petitioner drove 17,793 miles in 1967 for business purposes, or that the claimed business expense deduction of $1,984.38 was a proper deduction under the provisions of section 162.

In *Sullivan v. Commissioner*, 368 F. 2d 1007 (C.A. 2, 1966), reversing and remanding 45 T.C. 217 (1965), the

[1] All references are to the Internal Revenue Code of 1954.

Court of Appeals for the Second Circuit, to which an appeal in this case would lie, held that even if a taxpayer would have driven to and from work, had it not been necessary for him to transport his tools, he should be allowed to deduct as a business expense the portion of his reasonable driving expenses which is allocable to the transportation of the tools. The case was remanded to this Court for this Court to determine whether it was necessary for the taxpayer to transport his tools to and from his work, and whether the taxpayer would have driven to work, absent the necessity of transporting his tools. The Court of Appeals stated that if the taxpayer would not have driven to work, except for the necessity of transporting his tools, he should be entitled to deduct his reasonable driving expenses, limited to the cost of storage of the tools if some alternative means of storage of the tools was feasible. The Court further stated that if the taxpayer would have driven to work even had it not been necessary for him to transport his tools, then the expenses of driving to his work should be allocated between transportation of the taxpayer and transportation of his tools and only the amount for transportation of his tools allowed as a deduction, again limited to the cost of storage of the tools if some means of storage was feasible.

Respondent here has determined that storage of petitioner's tools was feasible in the instances set forth in the deficiency notice, and since no cost of such storage has been shown, the inference from his determination is that there would have been no cost for such storage. There is no showing in this case whether it was necessary for petitioner to carry his tools to and from work, if petitioner did find it necessary to carry his tools whether he would have driven to work regardless of this fact, or any other facts to show error in respondent's determination.

We therefore hold that petitioner has failed to offer proof to show error in respondent's disallowance of the $575.47 of the deduction claimed by petitioner for automobile expenses.

Decision will be entered for respondent.

Appendix B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the Tenth day of January one thousand nine hundred and seventy-four.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge
HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,
Circuit Judges

Michael DeMichele and Mary P. DeMichele,
Petitioners-Appellants,

v.

Commissioner of Internal Revenue,
Respondent-Appellee.

73-2299

Appeals from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel. ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

IRVING R. KAUFMAN
Chief Judge

J. JOSEPH SMITH
WILFRED FEINBERG,
Circuit Judges